UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

BWI TAXI MANAGEMENT, INC.,

Employer,

and 5-RC-16489

EVENING SHIFT CAB OPERATORS ASSOCIATION,

Petitioner.

SUPERSHUTTLE DFW, INC.,

Employer,

and 16-RC-10963

AMALGAMATED TRANSIT UNION LOCAL 1338,

Petitioner.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The issue before the National Labor Relations Board in these cases is whether the drivers engaged by BWI Taxi Management, Inc. ("BWI Taxi") to drive taxis at the Baltimore/Washington International Thurgood Marshall Airport and the drivers engaged by SuperShuttle DFW, Inc. ("SuperShuttle") to provide shared-ride transportation primarily at the Dallas/Fort Worth International Airport are "employees" or "independent contractors" within the meaning of Section 2(3)

of the National Labor Relations Act, 29 U.S.C. § 152(3). The Regional Director in *BWI Taxi Mgmt. Inc.*, 5-RC-16489, determined that the drivers in that case are employees. The Regional Director in *SuperShuttle DFW, Inc.*, 16-RC-10963, determined that the drivers in that case are independent contractors. The AFL-CIO files this brief in support of the Regional Director's decision in *BWI Taxi* and urging reversal of the Regional Director's decision in *SuperShuttle DFW*.

ARGUMENT

1. The Supreme Court has held that the Board "should apply the common-law agency test . . . in distinguishing an employee from an independent contractor." *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968). While "all of the incidents of the relationship must be assessed and weighed" in applying the common-law test, *id.* at 258, the fundamental distinction is between an independent contractor who "is engaged in a distinct occupation or business" as opposed to an employee who "is a part of the regular business of the employer." Restatement (Second) of Agency, § 220; *see also* Restatement (Third) of Agency, § 7.07 cmt. f (endorsing similar test). Put in the quaint terminology of the Restatement Second of Agency:

"[T]he servant is one within the personal or business household of the principal, whereas the non-servant is on the outside. The servant is, thus an integral part of his master's establishment; the non-servant aids in the business enterprise but is not a part of it." *Id.*, ch. 7, topic 2, title B, introductory note, p. 479.

Put in the terms used by the NLRA, the basic distinction between "employee[s]" and "independent contractor[s]" under the common law test is that employees "do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations." *United Insurance*, 390 U.S. at 258-59. In determining whether an individual "operate[s] [an] independent business[]" or "perform[s] functions that are an essential part of the company's normal operations," the determinative factor is whether the individual has a "significant entrepreneurial opportunity for gain or loss *when they are [performing services] for the [e]mployer.*" *BKN, Inc.*, 333 NLRB 143, 145 (2001) (emphasis added). *Accord Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (2000), *enforced*, 292 F.3d 777, 780 (D.C. Cir. 2002) ("significant entrepreneurial opportunity for gain or loss").

The Restatement Third of Employment Law explains that "[a]n individual renders services as part of an independent business when the individual in his or her own interest exercises entrepreneurial control over the manner and means by which the services are performed." Restatement (Third) of Employment Law, § 1.01 (Tentative Draft No. 2, 2009). "Entrepreneurial control" is defined, in turn, as "control over important business decisions, including whether to hire and where

¹ The cited version of the Restatement Third of Employment Law was approved by the membership of the American Law Institute at its 2009 Annual Meeting "subject to the discussion at the meeting and to editorial prerogative." *See* www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=31 (last checked Dec. 17, 2010). Once approved, "Tentative Drafts may be cited as representing the most current iteration of the [American Law] Institute's position until the official text is published." *Ibid*.

to assign assistants, whether to purchase and where to deploy equipment, and whether and when to service other customers." *Ibid.* Thus, where "the employer's control of . . . aspects of the work environment – such as the timing of assignments, the extent to which equipment is specially tailored for use for that employer only, the ability to hire assistants, and the ability to work for other clients – effectively prevents the individual from operating an independent business while performing work for the principal[,] . . . the relationship is . . . one of employment." *Id.*, Reporter's Memorandum, ch. 1, p. xvi.

The Restatement of Employment Law emphasizes that the determinative matter is the relationship between "the individual act[ing] . . . to serve the interests of the employer" and "the employer [who] consents to receive the individual's services." Restatement (Third) of Employment Law, § 1.01. That being so, "[t]he key question is whether a service provider functions as an independent business while performing services on the principal's behalf." Id., § 1.01 cmt. d (emphasis added). Of particular importance is whether "the employer's control of . . . the work environment . . . effectively prevents the individual from operating an independent business while performing work for the principal." Id., Reporter's Memorandum, ch. 1, p. xvi (emphasis added).

² Given the common-law test's focus on "whether a service provider functions as an independent business while performing services on the principal's behalf," Restatement (Third) of Employment Law, § 1.01 cmt. d, the ability of service providers to "tak[e] on additional . . . business during their off-hours," *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 499 n. 5 (D.C. Cir. 2009), is largely irrelevant, except in so far as it sheds light on whether the individual providing a

In sum, an employer who seeks to invoke the "independent contractor" exception to the NLRA's broad definition of "employee" has the burden of proving that the individuals in question have "significant entrepreneurial opportunity for gain or loss when they are [performing services] for the [e]mployer." *BKN Inc.*, 333 NLRB at 145.

2. The drivers employed by BWI Taxi clearly do not "function[] as . . . independent business[es] while performing services on the principal's behalf." Restatement (Third) of Employment Law, § 1.01 cmt. d. The drivers are thus "employees" under "the pertinent common-law agency principles." *United Insurance*, 390 U.S. at 258.

The "regular business" of BWI Taxi Management is "operat[ing] and manag[ing] a Taxicab Concession at the [BWI] Airport" as "the exclusive contractor . . . to provide taxicab service from points at the Airport to on and off-Airport destination[s]." BWI Taxi Ex. 1, 2, 20. Specifically, by the terms of its contractual agreement with the Maryland Aviation Administration (the "MAA"), BWI Taxi is required to provide "a high quality taxicab service adequate to meet the requirements of all deplaning airlines passengers and their accompanying baggage" on a "twenty-four (24) hours a day, seven (7) days a week" basis. *Id.*, 1.

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service to the employer does so as part of a "distinct occupation or business," Restatement (Second) of Agency, § 220, that provides the same service to other clients. The D.C. Circuit thus erred in according weight to the mere ability of service providers to "tak[e] on additional . . . business during their off-hours" in FedEx Home Delivery.

In order to accomplish the "functions that are an essential part of [its] normal operations," *United Insurance*, 390 U.S. at 258-59, BWI Taxi contracts with drivers, including drivers who own their own vehicles ("owner-operators"), drivers who, subject to the approval of BWI Taxi, lease vehicles from owner-operators who have a contractual relationship with BWI Taxi but do not themselves drive ("second drivers"),³ and drivers who lease their vehicles directly from BWI Taxi-controlled entities ("lease drivers"). DDE 6-7. All of these drivers pay BWI Taxi a flat weekly fee for the opportunity to receive trips dispatched by the company and to keep whatever fares they earn from these trips. *Id.*, 2.

BWI Taxi requires each of its drivers to work a full-time schedule providing rides to airport passengers on BWI Taxi's behalf – five twelve-hour shifts per week for owner-operators and six shifts per week for lease drivers. *Id.*, 6, 8. During this time, BWI Taxi closely controls the drivers' activities. Drivers may only accept trips dispatched to them by BWI Taxi; the company specifically prohibits drivers from soliciting their own passengers, both at the airport as well as on return trips from a destination. *Id.*, 3-4. Conversely, drivers must accept all trips assigned to them by BWI Taxi. *Id.*, 3. Drivers who violate any of BWI Taxi's dispatch rules are subject to discipline. *Id.*, 4.

The drivers are obviously not independent businesspeople "engaged in a distinct occupation or business," Restatement (Second) of Agency, § 220, of

³ The parties stipulated to the exclusion of second drivers from the unit. DDE 3.

providing taxicab services to BWI Taxi and other clients. Indeed, the drivers' contract with BWI Taxi explicitly prohibits them from "hav[ing] any right, title, or interest in any competing taxicab operation or business" in the area or from "accept[ing] employment or operat[ing] a taxicab for any individual firm or corporation in competition with BWI Taxi." BWI Taxi Ex. 3, 7. Further, because the drivers are required to identify their vehicles as a "B.W.I.T.M. Cab[s]" with permanent markings, *id.*, 5, as a practical matter, drivers cannot use their vehicles to provide taxicab services independently or in the service of any company other than BWI Taxi.

BWI Taxi contends that the Board should ignore the restrictions the company places on its drivers because "virtually all of the work rules for [BWI Taxi's] taxicab drivers stem from the requirements found in the MAA Contract" and that such "requirements imposed by [a government contract] . . . do not constitute evidence of employer control." BWI Taxi Req. for Rev., 31-32 (quoting Air Transit, Inc., 271 NLRB 1108, 1111 (1984)). See also Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 875 (D.C. Cir. 1978) ("Government regulations constitute supervision not by the employer but by the state."). The Regional Director correctly concluded, however, that the drivers are employees even if "requirements imposed by governmental regulations" are not considered. DDE 2.

The rule invoked by BWI Taxi has little application here because the rule goes to "government regulation of [the] particular occupation" engaged in by the

individual who provides services to the employer and *not* to government regulation of the employer's business itself. *Local 777*, *Democratic Union Organizing Comm.*, 603 F.2d at 875 (emphasis added). The basis for the rule is the notion that "requiring drivers to obey the law is no more control by the [employer] than would be a routine insistence upon the lawfulness of the conduct of those persons with whom one does business." *Ibid.* But that rationale applies only to government regulations that control the drivers directly, not to government "regulations" of the employer's business such as a contract that the employer enters into with a government entity that sets forth specific service requirements.

In this case, the MAA contract does not regulate the drivers directly, but rather states the manner in which BWI Taxi is "obligated to operate and manage [the] Taxicab Concession at [BWI] Airport." BWI Taxi Ex. 1, 2. For example, the MAA contract requires BWI Taxi to provide taxi service on a "twenty-four (24) hours a day, seven (7) days a week" basis, *id.*, 1, but does not state *how* BWI Taxi must provide this service. BWI Taxi, *not the MAA*, decided to fulfill this contractual requirement by requiring its drivers to work five or six mandatory shifts per week exclusively servicing the airport, rather than engaging a larger number of drivers and allowing them to choose when to service the airport and when to work independently picking up non-airport fares. The D.C. Circuit's rule

in Local 777, Democratic Union Organizing Committee is thus irrelevant to this case.⁴

In light of all of these facts, the drivers are clearly employees of BWI Taxi, not independent contractors. While engaged by BWI Taxi, the drivers exclusively provide a service that is "the regular business of the employer," Restatement (Second) of Agency, § 220, *i.e.*, providing taxicab rides to airport patrons. While providing this service to BWI Taxi, drivers are precluded from "exercis[ing] entrepreneurial control over the manner and means by which the services are performed," Restatement (Third) of Employment Law, § 1.01. Instead, drivers must provide all rides – and only such rides – as are dispatched to them by BWI Taxi. Finally, when they are not engaged in providing services to BWI Taxi, the company "precludes [the drivers] from rendering the[ir] services as part of an independent business," *ibid.*, preventing the drivers from providing taxicab services other than to BWI Taxi.

BWI Taxi therefore has not met its burden of proving that its taxicab drivers have the "significant entrepreneurial opportunity for gain or loss when they

⁴ That said, the D.C. Circuit's rule is confusing and out-of-step with the common law's focus on the relationship between "the individual act[ing] . . . to serve the interests of the employer" and "the employer [who] consents to receive the individual's services." Restatement (Third) of Employment Law, § 1.01. The Board should, therefore, abandon its current rule in favor of one that focuses on the actual requirements the employer places on the individuals who provide it with services – and the effect of these requirements on the ability of these service-providers to "exercise entrepreneurial control over the manner and means by which the services are performed," Restatement (Third) of Employment Law, § 1.01 – rather than on the underlying basis for the requirements.

are [performing services] for the [e]mployer," *BKN*, *Inc.*, 333 NLRB at 145, that would render them independent contractors.

3. SuperShuttle's drivers are also employees, not independent contractors, because, like BWI Taxi's drivers, they do not "function[] as . . . independent business[es] while performing services on the principal's behalf." Restatement (Third) of Employment Law, § 1.01 cmt. d.

The "regular business" of SuperShuttle is to provide shared-ride van transportation to patrons of Dallas/Fort Worth International Airport and Love Field Airport. DO 2-3. By the terms of its contractual agreement with the Dallas/Forth Worth International Airport Board (the "DFW Airport Board"), SuperShuttle provides "a twenty-four hour, seven day per week dispatching and reservation system" for both "on-demand and pre-arranged" trips. SuperShuttle Ex. 1, 10.

In order to accomplish the "functions that are an essential part of [its] normal operations," *United Insurance*, 390 U.S. at 258-59, SuperShuttle engages drivers with whom it enters into uniform one-year franchise agreements. DO 4. Some of these drivers own their own vehicles, while others lease their vehicles from a SuperShuttle-affiliated company. *Id.*, 5. In either case, under the terms of the franchise agreement, drivers are permitted to operate only a single vehicle for SuperShuttle. SuperShuttle Ex. 2, 3. Although drivers are allowed, subject to the approval of the employer, to use a "relief driver" on those occasions when the franchise driver cannot work (the franchise driver is required by the terms of the

franchise agreement to be "the principal driver of the Vehicle," *id.*, 10), as a factual matter only one driver does so. DO 9-10. Drivers pay SuperShuttle a flat weekly franchise fee, as well as paying a weekly insurance premium to an employer-designated insurer, for the privilege of receiving trips dispatched by the company. *Id.*, 4-5. In exchange, drivers keep whatever fares they earn from these trips. *Id.*, 5.

The Regional Director found that the drivers are "under no obligation" to work a fixed schedule – or, for that matter, "to work at all" – or to accept any particular trip offered by SuperShuttle dispatchers.

Id., 6-7. However, the drivers are prohibited from soliciting their own passengers or setting their own fares.

Id., 15. As a result, while the drivers have some flexibility in deciding how much to work for SuperShuttle, they do not "exercise[] entrepreneurial control over the manner and means by which the services are performed." Restatement (Third) of Employment Law, § 1.01. Moreover, due to the structure of the franchise relationship, as a practical matter, drivers must work a significant number of hours

⁵ The franchise agreement, however, grants drivers permission to operate a SuperShuttle van only during specified shifts and in specified geographical areas. SuperShuttle Ex. 2, 3. The franchise agreement also states that drivers "shall accept all assignments to transport customers delivered via [SuperShuttle's] Trip Generating System." *Id.*, 12.

⁶ Drivers are permitted to participate in a "hotel circuit" in which drivers negotiate directly with hotels to provide trips to hotel guests. DO 8. The hotel, rather than SuperShuttle, apparently dispatches these trips to drivers. *Ibid*. However, SuperShuttle levies fines on drivers who agree to work the "hotel circuit" and then do not do so. Union's Req. for Rev., 7-8. SuperShuttle also facilitates the "hotel circuit" by deducting a fee from participating drivers that is used to reimburse the hotels for costs associated with operating the "hotel circuit" dispatch system. *Ibid*.

for SuperShuttle each week in order to cover their weekly franchise fee and mandatory insurance payment. In sum, drivers are unable "to make an entrepreneurial profit beyond a return on their labor and their capital investment." *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998). That is, the mere fact that drivers "can influence their net remuneration . . . by working harder or more skillfully for [the employer]" does not convert them into independent contractors where "[t]hey retain no entrepreneurial ability to attempt to increase their economic returns by making different business decisions." Restatement (Third) of Employment Law, § 1.01 cmt. d, Illustration 8, p. 12.

The conclusion that the drivers do not function as independent businesspeople "engaged in a distinct occupation or business," Restatement (Second) of Agency, § 220, is confirmed by the fact that SuperShuttle contractually prohibits its drivers from any "involvement in another business that provides transportation services." SuperShuttle Ex. 2, 10. As a result, drivers must use their vehicles to provide trips to SuperShuttle clients or not use them for any business purpose at all. Further, even in the absence of this contractual prohibition, drivers would be unable to use their vehicles for any business purpose other than providing trips to SuperShuttle clients because drivers are required to paint their vehicles in "SuperShuttle's trademark blue and yellow combination and ... affix[] ... a large SuperShuttle logo" to their vans. DO 5. This "special[] tailor[ing] [of the vehicle] for use for [SuperShuttle] only ... effectively prevents

[a driver] from operating an independent business." Restatement (Third) of Employment Law, Reporter's Memorandum, ch. 1, p. xvi.

Finally, as in *BWI Taxi*, SuperShuttle contends that the Board should ignore all driver requirements based on SuperShuttle's contract with the DFW Airport Board as supposedly irrelevant "government regulations." SuperShuttle Req. for Rev. 3-8. As in *BWI Taxi*, however, the company's agreement with the Airport Board does not regulate the drivers directly but rather requires SuperShuttle to "operate a shared-ride service [for airport patrons] in accordance with the terms and conditions of th[e] Contract." SuperShuttle Ex. 1, 7. Because it is SuperShuttle, not the DFW Airport Board, who decides *how* to fulfill these contractual requirements, the D.C. Circuit's rule that "[g]overnment regulations constitute supervision not by the employer but by the state," *Local 777*, *Democratic Union Organizing Comm.*, 603 F.2d at 875, does not apply in this case.

Based on the foregoing facts, the drivers are employees of SuperShuttle, not independent contractors. Whenever drivers perform services for SuperShuttle, they are engaged exclusively in "perform[ing] functions that are an essential part of the company's normal operations," *United Insurance*, 390 U.S. at 258-59, *i.e.*, providing shared-ride van transportation to airport patrons. And while engaged in performing this function, drivers are prevented from "exercise[ing] entrepreneurial control over the manner and means by which the services are performed," Restatement (Third) of Employment Law, § 1.01, because they can only use their

vehicles to accept trips dispatched to them by SuperShuttle. Finally, SuperShuttle denies drivers the ability to develop independent businesses outside of their engagement with SuperShuttle by flatly prohibiting drivers from providing "transportation services" independently or to any entity other than SuperShuttle itself.

SuperShuttle therefore has not met its burden of proving that its drivers have the "significant entrepreneurial opportunity for gain or loss when they are [performing services] for the [e]mployer," *BKN*, *Inc.*, 333 NLRB at 145, that would render them independent contractors.

CONCLUSION

The Regional Director's Decision and Direction of Election in *BWI Taxi* should be affirmed and the Regional Director's Decision and Order in *SuperShuttle DFW* should be reversed.

December 22, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

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